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No. 99-1590

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

SEFAFINO F. VELARDI,

Petitioner,

-against-

NEW YORK CITY FIRE DEPARTMENT PENSION FUND,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 25, 2000

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COUNTER STATEMENT OF THE QUESTION PRESENTED

When it was undisputed that plaintiff retired in 1975 and the Americans with Disabilities Act (ADA) did not become effective until 1992, did the United States Court of Appeals for the Second Circuit correctly determine that the ADA did not apply to plaintiff's claims concerning his retirement?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

COUNTER STATEMENT OF THE CASE

Plaintiff is a former captain of the New York City Fire Department (FDNY) who retired on a disability pension in 1975, based on a progressive hearing loss, which was not linked to an employment incident. (Affidavit of Susan Sanders in Support of Motion For Summary Judgment, hereinafter "Sanders", Exhibits 7, 10. Plaintiff, appearing pro se, did not provide an Appendix on Appeal, so reference is made to the original documents of record.). Plaintiff seeks the addition to his pension of Variable Supplement Fund (VSF) payments.

In retiring, plaintiff had the option under the New York City retirement system laws of seeking service retirement or a disability pension. Under an accident disability pension, NYC Admin. Code § 13-366, the retiree receives a pension of at least three-quarters of the retiree's final salary. Under ordinary disability, the retiree receives a pension allowance of at least half of final salary if the retiree has at least twenty years of service, or one-fortieth of final year's salary multiplied by the number of years of service. See NYC Admin. Code §§ 13-362, 13-363. A retiree on accident disability has to be unable to perform regular job duties because of an accidental injury received in the line of duty, while a retiree on ordinary disability must be unable to perform the regular job duties because of a disability which is not shown to have been incurred in the line of duty. A retiree "for service" must have at least

twenty years of service, receiving a pension of one-half of the final salary and one-sixtieth of the total earnings received after the person's twentieth anniversary of service. NYC Admin. Code § 13-359.

VSF payments were first instituted in collective bargaining agreements; in 1968 with the Uniformed Firefighters Association, and in 1970 with the Uniformed Fire Officers Association. Chapter 877 of the Laws of New York of 1970 was the first piece of legislation codifying the rights and procedures involving VSF payments, which has been the subject of later legislation. The history of the VSF payments is detailed in the District Court opinion of a case decided with the instant case, Graboski v. Giuliani, 937 F.Supp 258, 260-262 (S.D.N.Y. 1996), affd 142 F.3d 58 (2d Cir. 1998). The VSF payments result from enhanced returns from investment of part of the Fire Department Pension Fund in equities rather than in fixed income securities.

The legislation governing VSF payments specifically provides that the only permissible retiree beneficiary of VSF payments is a retiree who receive a retirement allowance by reason of having retired "for service". NYC Admin. Code §§ 13-382 (5); 13-392 (6). Retirees on disability pensions do not receive VSF payments.

Proceedings

The complaint in this action had originally been dismissed by the District Court, 937 F.Supp. 258 (S.D.N.Y. 1996). On a prior appeal to the Second Circuit Court of Appeals, Velardi v. New York City Fire Department Pension Fund, decided with Castellano v. City of New York, Graboski v. Giuliani, Adornetti v. New York City Employees Retirement System, and Clifford v. New York

Police Pension Fund, 142 F.3d 58 (2d Cir. 1998), cert. den., (Castellano) 525 U.S. 820 (1998), (Graboski) 525 U.S. 922 (1998), the Second Circuit held that the provision of VSF payments with "for service" pensions, but not with disability pensions, did not constitute discrimination on the basis of disability in violation of the ADA, since a disabled retiree could choose a service retirement pension, which included the VSF payments, rather than a disability pension. Nothing in the ADA required that the disability pension, which was freely chosen by the members, also be supplemented with VSF benefits, citing Felde v. City of San Jose, 839 F.Supp. 708, 710 (N.D. Cal 1994), affd 66 F.3d 335 (9th Cir. 1995) (table). The Court also held that the VSF implementing legislation did not impair any prior contract right to VSF payments, or create any new contractual rights thereto. The Second Circuit also rejected an equal protection claim as well as other claims.

On that prior appeal, the Second Circuit reinstated the complaint in Velardi v. New York City Fire Department Pension Fund, supra, 142 F.3d at 72, because Velardi alleged that he was required to retire on a disability pension rather than "for service" in that he was unaware of the latter option and it was never offered to him. Accordingly, his complaint stated a valid cause of action that he was required to take a disability benefit which was less advantageous than a service retirement benefit for which he was also eligible, and his case was remanded to determine whether plaintiff was forced to forego "for service" benefits in that the FDNY failed to inform him of the "for service" retirement option.

The complaint in this action did not state the date of plaintiff's retirement. On remand, it was established that plaintiff's retirement was effective on December 20, 1975 (Sanders, Exhibit 10).

The record before the District Court on the remand indicated that plaintiff initially had applied for service retirement but revoked that application to seek a pension based on disability (Sanders, Exhibit 2). Plaintiff stated at his deposition (Sanders, Exhibit 36) that at the time he applied for retirement he was aware of the formula for calculating "for service" pensions and ordinary disability pensions (Exhibit 36, pp. 10-12). He also knew that "for service" retirees would receive VSF payments and that disability retirees would not (Id. 19-20), but he submitted an application for accidental disability retirement (Id. 28) because he was certain that he would be awarded it (Id. 30). In his opinion, his disability was service related and was caused by years of fire service (Id. 30, 31). Plaintiff was shocked that he was not found eligible for accidental disability retirement (Id. 44), based on the absence of any job incident to which the hearing loss was attributable (Id. 34-35).

Plaintiff stated that he was unaware of a former FDNY policy that once an application for disability retirement was submitted and the applicant was found to be disabled but ineligible for accident disability retirement, the applicant could not thereafter retire "for service", but was retired for ordinary disability (Exhibit 36, p. 47).[1] Plaintiff

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[1] See affidavit of David Clinton, FDNY Deputy Commissioner for Legal Affairs, par. 9, which policy was changed after a 1977 tax law change removing favorable tax treatment for ordinary retirement benefits which had previously rendered ordinary disability retirement unquestionably more favorable than "for service" retirement. The policy was changed to reflect the new possibility that "for service" retirement was more favorable

Continued...

admitted that when he retired in 1975 ordinary disability pensions received favorable tax treatment in that $5200 annually was exempt from taxation, which tax benefit was not revoked until after his retirement, with that legislative change being unanticipated at the time of his retirement. (Exhibit 36, p. 60, see also Affidavit of Albert Connolly, the Supervisor of Division Benefits for the FDNY Pension Fund). At the time of plaintiff's retirement only one VSF annual payment had been made, of $572, and the annual VSF payment did not increase until 1987 (Id. 67-68; see also, Affidavit of Sanford Smolowitz, Deputy Director of the FDNY Pension Bureau).

DECISION AND JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

By Decision dated September 18, 1998, reported at 20 F.Supp.2d 623, the District Court for the Southern District of New York (Kaplan, J.), granted defendant's motion for summary judgment. The District Court noted that prior to the remand plaintiff never indicated that the date of his retirement was December 20, 1975; and the complaint asserted that the discriminatory act complained of occurred on September 15, 1992 (20 F.Supp.2d at 625). The Decision states (20 F.Supp.2d at 625):

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than ordinary disability retirement, and the potential ordinary disability retiree was also afforded the opportunity to select "for service" retirement.

> The ADA was enacted on July 26, 1990 and became effective in 1992. It is not retroactive, and it does not apply to actions taken prior to its effective date. Here, plaintiff retired nearly seventeen years prior to the effective date of the statute. Even if he was "forced," by lack of adequate information concerning his retirement options, to retire on ordinary disability rather than on the allegedly more advantageous "for service" basis, the defendant's action simply was not covered by the ADA.

The District Court rejected plaintiff's argument that the defendant failed to timely raise the lack of applicability of the ADA, because "[p]laintiff's complaint falsely stated that the alleged discriminatory acts occurred on September 15, 1992. When defendant discovered following the remand by the Court of Appeals that plaintiff in fact was complaining of events that had occurred seventeen years earlier, it properly exercised its rights." 20 F.Supp.2d at 625-626. The District Court also noted that on the prior appeal the Second Circuit was never made aware that plaintiff retired in 1975, not in 1992, as might be inferred from the complaint.

The District Court also rejected plaintiff's contention that his 1975 retirement on disability, without VSF payments, constituted a continuing violation. "While the commission of a discriminatory act within the limitations period, in limited circumstances, may permit an employment discrimination plaintiff to obtain relief with respect to events for which relief otherwise would be barred by the statute of limitations, there is not a scrap of support for the suggestion that an act lawful when committed may be rendered unlawful by the subsequent

passage of legislation which proscribes such acts prospectively." 20 F.Supp.2d at 626.

The Decision of the District Court was effected by a Judgment entered September 29, 1998, granting summary judgment dismissing the complaint.

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

In a Summary Order, dated May 28, 1999, 182 F.3d 902, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court, stating:

> Appellant sued under the Americans with Disabilities Act, *42 U.S.C. §§ 12101-213* (1990). After granting the appellee's motion for summary judgment, Judge Kaplan dismissed the complaint. This appeal followed.
>
> The Americans with Disabilities Act was enacted in 1990 and became effective on July 26, 1992. Pub. L. No. 101-336 § 108, 104 Stat. 327, 337 (1990). The Act does not apply retroactively to acts taken before its effective date. See *Smith v. United Parcel Service, 65 F.3d 266 (2d Cir. 1995)*. Velardi's retirement, the circumstances of which form the basis of this action, occurred in 1975, well before the effective date of the ADA. Therefore, the ADA does not apply to the present action.

By Order dated July 23, 1999, the Court of Appeals for the Second Circuit denied plaintiff's petition for panel

rehearing, and by Order dated January 20, 2000, the same Court denied the petition for rehearing en banc.

REASONS FOR DENYING THE WRIT

The Second Circuit Court of Appeals correctly determined that the plaintiff's retirement was not actionable under the ADA. Plaintiff retired in 1975. The ADA became effective on July 26, 1992. As held by each circuit to consider the issue, as well as by the Second Circuit in a prior decision, the ADA was not retroactive. Smith v. United Parcel Service, 65 F.3d 266 (2d Cir. 1995) citing Pub. L. No 101-336, § 108, 104 Stat. 327, 337 (1990); Martin v. Southwestern Virginia Gas Co., 135 F.3d 307, 309 (4th Cir. 1998); Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1529 (11th Cir. 1997); Gra[illegible]ling v. Village of Lombard, Illinois, 58 F.3d 295, 296-297 (7th Cir. 1995); Burfield v. Brown, Moore & Flint, 51 F.3d 583, 588 (5th Cir. 1995).

The courts below correctly rejected plaintiff's claim that his continuing receipt of an ordinary disability pension without VSF payments constitutes a continuing violation. When plaintiff retired in 1975, the ADA was not in existence and it was not effective until 1992. All actions taken in 1975 were lawful under existing law. Furthermore, a discrete employment action, even if unlawful at the time it was taken, is not a continuing violation simply because it has effects upon terms of employment for the plaintiff long after the applicable statute of limitations has expired. See United Airlines v. Evans, 431 U.S. 553, 558 (1977); Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 908 (1989). The circuit courts have also repeatedly rejected claims that member pension choices or actions by pension plans, taken prior to the effective date of ERISA, are actionable under ERISA as a continuing violation. See Freeman v. Jacques

Orthopaedic and Joint Implant Medical Surgery Group, Inc., 721 F.2d 654 (9th Cir. 1983); Coward v. Colgate Palmolive Co., 686 F.2d 1230 (7th Cir. 1982), cert. den. 460 U.S. 1070 (1983); Baum v. Nolan, 853 F.2d 1071 (2d Cir. 1988), cert. den. 489 U.S. 1053 (1989); Lamontagne v. Pension Plan of the United Wire, Metal & Machine Pension Fund, 869 F.2d 153, 156 (2d Cir. 1989), cert. den. 493 U.S. 818 (1989).

This Court has rejected retroactive relief even when a pension contribution or payment scheme was found by the Court to violate Title VII, holding that retroactive relief would contravene prior actuarial assumptions upon which the operation of the funds was based. See, City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702, 721-723 (1978); Arizona Governing Committee v. Norris, 463 U.S. 1073, 1093-1095 (1983). In Florida v. Long, 487 U.S. 223, 239 (1988), this Court specifically rejected the argument also made by the plaintiff herein that the payment of a retirement benefit below the amount of a claimed entitlement is a continuing violation:

> It is not correct to consider payments of benefits based on a retirement that has already occurred as a sort of continuing violation. Our decision in *Bazemore v. Friday, 478 U.S. 385 (1986)*, is not to the contrary. *Bazemore* concerned the continuing payment of discriminatory wages based on employer practices prior to Title VII. In a salary case, however, each week's paycheck is compensation for work presently performed and completed by an employee. Further, the employer does not fund its payroll on an actuarial basis. By contrast, a pension plan, funded on an actuarial basis, provides benefits fixed under

> a contract between the employer and retiree based on a past assessment of an employee's expected years of service, date of retirement, average final salary, and years of projected benefits. In the pension fund context, a continuing violation principle in every case would render employers liable for all past conduct, regardless of whether the liability principle was first announced by *Manhart*, *Norris*, or our decision here. We cannot recognize a principle of equitable relief that ignores the essential assumptions of an actuarially funded pension plan.

For all of these reasons, the Courts below correctly ruled that plaintiff's retirement in 1975 was not actionable under the ADA, which became effective in 1992, and correctly rejected plaintiff's claim that his 1975 retirement was actionable as a continuing violation. This Court is respectfully urged to deny this petition for a writ of certiorari.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: April 25, 2000
New York, New York

Respectfully Submitted,

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